

1989

The State of Utah v. Danny Hugh Knight and Gay Knight : Brief of Appellant

Utah Court of Appeals

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Attorneys for Respondent.

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DOCKET NO. 890220

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,)	
)	
Plaintiff-Respondent,)	
)	
'vs.)	Case No. 890220-CA
)	
DANNY HUGH KNIGHT, and)	Classification Priority 2
GAY KNIGHT,)	
)	
Defendant-Appellant.)	

Appeal from a Judgment, Conviction, and Sentence on a Class B Misdemeanor of possession of a controlled substance as to both Defendants, and a Class B Misdemeanor of possession of drug paraphernalia as to the Defendant Danny Hugh Knight alone following a non-jury trial in the Fifth Circuit Court for Iron County, State of Utah, the Honorable Robert F. Owens presiding.

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THE STATE OF UTAH,)	
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Plaintiff-Respondent,)	
)	Case No. 890220-CA
vs.)	
)	
DANNY HUGH KNIGHT, and,)	
GAY KNIGHT,)	
)	
Defendant-Appellant.)	

JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 78-2a-3(2)(d), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment, Sentence, Stay of Execution of Sentence, and Order of Probation following a motion to suppress which was denied and a non-jury trial in which the Defendants-Appellants were both convicted on possession of a controlled substance, and the Defendant Danny Hugh Knight was convicted of possession of drug paraphernalia, all offenses being Class B Misdemeanors.

ISSUED PRESENTED ON APPEAL

Did the trial court err in allowing a search warrant issued by a Justice of the Peace acting as a temporary Judge of the Fifth Circuit to support the search of the home of the Defendants and the seizure of the evidence in this matter.

DETERMINATIVE STATUTES OR RULES

The Constitutional provision which is believed to be determinative in this matter is Article 8, Section 7 of the Utah State Constitution which reproduced in the addendum to this brief.

NATURE OF THE CASE

This is an appeal from a Judgment, Sentence, Stay of Execution of Sentence, and Order of Probation issued by the Fifth Circuit Court for Iron County, State of Utah. The Judgment was rendered after the Defendants were convicted at a non-jury trial which immediately followed a ruling by the Circuit Court denying a Motion to Suppress Evidence.

COURSE OF THE PROCEEDINGS

A search warrant was issued by the Honorable Margaret Miller, acting as Circuit Court temporary judge, on January 11, 1989. Pursuant to that search warrant, agents of the Utah State Department of Adult Probation and Parole searched the Defendants' home, seized marijuana and drug paraphernalia, and arrested the Defendants. A Motion to Suppress was filed by the undersigned and calendared for February 6, 1989, in the Circuit Court before the Honorable Robert T. Braithwaite. Judge Braithwaite recused himself and assigned the matter to Judge Robert Owens since it was Judge Braithwaite's order which was the subject of the Motion to Suppress. Judge Owens heard the Motion to Suppress and denied the same on March 3, 1989. Judge Owens immediately thereafter heard the trial in the matter and convicted the Defendant, Danny

Hugh Knight, of possession of drug paraphernalia, a Class B Misdemeanor and possession of marijuana, a Class B Misdemeanor. Judge Owens also found the Defendant, Gay Knight, guilty of possession of marijuana, a Class B Misdemeanor.

DISPOSITION AT TRIAL COURT

Both Defendants were sentenced in the trial court to six (6) months in the county jail and a \$1,000.00 fine on each count for which they were convicted. Both Defendants were thereafter placed on probation, and they are presently under the jurisdiction of the court on probation.

STATEMENT OF FACTS

The Defendants were charged with possession of marijuana and possession of drug paraphernalia following the execution of a search warrant issued by the Honorable Margaret Miller, Justice of the Peace for the Cedar Precinct, Iron County, State of Utah, serving as temporary Fifth Circuit Judge under an order of that court dated October 7, 1988, and signed by the presiding Judge of the Fifth Circuit Court, the Honorable Robert T. Braithwaite. (The Search Warrant and the October 7, 1989, order are both reproduced in the addendum to this brief. The documents are cited in the Record at page 4 of the Transcript.) In the search of the home pursuant to the warrant executed by Judge Miller, an agent of the Utah State Department of Adult Probation and Parole found marijuana and drug paraphernalia used in the consumption of marijuana. (T.20-21) A Motion to Suppress hearing

was held before the Honorable Robert F. Owens on March 3, 1989, and the Court denied the Defendants' Motion to Suppress. Judge Owens specifically found that Judge Miller executed the search warrant on January 11, 1989, as Circuit Court Temporary Judge. Judge Owens also found that Justice of the Peace Miller is the elected and duly qualified Justice of the Peace of Cedar City Precinct, Iron County, and that Judge Miller was a qualified magistrate, qualified to issue search warrants. (The Findings and Order Denying Defendants' Motion to Suppress are reproduced in the addendum to this brief.)

SUMMARY OF ARGUMENT

The Motion to Suppress should have been granted because Judge Miller had no Constitutional authority to issue any orders as a temporary circuit court judge.

ARGUMENT

POINT I

THE SEARCH WARRANT ISSUED BY JUDGE MILLER SHOULD BE RULED AS INVALID BECAUSE OF HER LACK OF CONSTITUTIONAL AUTHORITY TO SERVE AS A TEMPORARY CIRCUIT COURT JUDGE.

In this matter Judge Margaret Miller, the Cedar Precinct Justice of the Peace for Iron County, State of Utah, issued the search warrant which is in question. Judge Miller issued the search warrant under an order of the Circuit Court dated October 7, 1988, and included herewith as an addendum to this brief. The search warrant purports to name Judge Miller as a Circuit Court temporary Judge.

However, the recently amended Section 7 of Article 8 of the Utah State Constitution requires that circuit court judges in the State of Utah be admitted to practice law in Utah. While the undersigned recognizes that Miller, in her own capacity as the Cedar Precinct Justice of the Peace, would be authorized to issue search warrants arising out of her own court, it is the Defendant's position that it is wholly improper for Judge Miller to issue warrants or to take any other action as a circuit court judge when she is constitutionally barred from serving in that capacity. The statutory authority on which Judge Miller was purportedly appointed to the Circuit Court was repealed prior to the October 7, 1988, order. Therefore, there was no claim of authority in any instance for Judge Miller's serving as a circuit court temporary judge.

The Appellants take exception to the Trial Court's use of the Statute which grants magistrate's the authority to issue search warrants (77-23-1, Utah Code Annotated, 1953, as amended) as a justification for the unconstitutional exercise of the powers of the Circuit Court by a non-lawyer judge. Because the amendment of the Judicial Article of the Utah State Constitution is so recent, there is no case authority on the issue raised by the Appellants. They would argue that the application of the exclusionary rule to the evidence in this case is the only reasonable solution to this unconstitutional abuse of the powers of the Circuit Court.

POINT II

NO GOOD FAITH ARGUMENT CAN BE MADE FOR THE ISSUANCE OR THE EXECUTION OF THE SEARCH WARRANT ON THE PART OF THE STATE'S AGENTS.

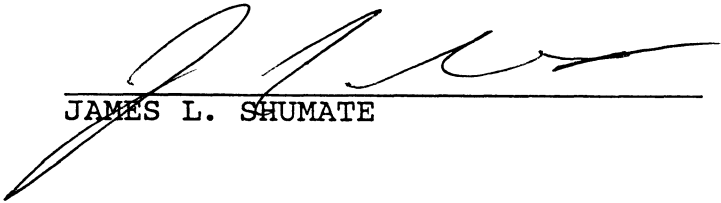
The statutory provisions exempting evidence obtained under search warrants issued in error but acted upon in good faith by peace officers has been stricken by the Utah Supreme Court, State v. Mendoza, 748 P.2d 181 (Utah, 1988). This court has ruled that the common-law good faith exception to the exclusionary rule is still valid in the State of Utah, State v. Thompson, 751 P.2d 805 (Utah Ct. App., 1988). However, in this instance, there can be no good faith exception since the statute giving Judge Miller authority was repealed by the State legislature and the Constitution was amended taking away from Judge Miller any possibility of serving as a temporary Circuit Court Judge. The affidavit, as well as the search warrant, were prepared by the Iron County Attorney's office who had adequate notice of the repeal of the statute and the constitutional amendment, and therefore good faith cannot be implied in this instance.

CONCLUSION

Because the use of the exclusionary rule is the only reasonable remedy available to the Appellants who suffered from this unauthorized use of Circuit Court authority, the trial court should be directed to reverse its earlier Order, denying the Motion to Suppress. This Court should remand the case to the

trial court with instructions to grant the Motion to Suppress.

DATED this 15th day of ~~July~~^{August}, 1989.



JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Scott M. Burns, Iron County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 15th day of ~~July~~^{August}, 1989, first class postage fully prepaid.



Secretary

currence of a majority of all justices of the supreme court. If a justice of the supreme court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause. 1985

Sec. 3. [Jurisdiction of supreme court.]

The supreme court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The supreme court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the supreme court's jurisdiction or the complete determination of any cause. 1985

Sec. 4. [Rule-making, power of supreme court — Judges pro tempore — Regulation of practice of law.]

The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the supreme court upon a vote of two-thirds of all members of both houses of the legislature. Except as otherwise provided by this constitution, the supreme court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The supreme court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law. 1985

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause. 1985

Sec. 6. [Number of judges of district court and other courts — Divisions.]

The number of judges of the district court and of other courts of record established by the legislature shall be provided by statute. No change in the number of judges shall have the effect of removing a judge from office during a judge's term of office. Geographic divisions for all courts of record except the supreme court may be provided by statute. No change in divisions shall have the effect of removing a judge from office during a judge's term of office. 1985

Sec. 7. [Qualifications of justices and judges.]

Supreme court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection, and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divi-

sions are provided for any court, judges of that court shall reside in the geographic division for which they are selected. 1985

Sec. 8. [Vacancies — Nominating commissions — Senate approval.]

When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the judicial nominating commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the supreme court shall within 20 days make the appointment from the list of nominees. The legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the legislature may serve as a member of, nor may the legislature appoint members to, any judicial nominating commission. The senate shall consider and render a decision on each judicial appointment within 30 days of the date of appointment. If necessary, the senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective upon approval of a majority of all members of the senate. If the senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence. Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political considerations. 1985

Sec. 9. [Judicial retention elections.]

Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each supreme court justice every tenth year, and each judge of other courts of record every sixth year, shall be subject to an unopposed retention election at the corresponding general election. Judicial retention elections shall be held on a nonpartisan ballot in a manner provided by statute. If geographic divisions are provided for any court of record, the judges of those courts shall stand for retention election only in the geographic division to which they are selected. 1985

Sec. 10. [Restrictions on justices and judges.]

Supreme court justices, district court judges, and judges of all other courts of record while holding office may not practice law, hold any elective nonjudicial public office, or hold office in a political party. 1985

Sec. 11. [Judges of courts not of record.]

Judges of courts not of record shall be selected in a manner, for a term, and with qualifications provided by statute. However, no qualification may be imposed which requires judges of courts not of record to be admitted to practice law. The number of judges of courts not of record shall be provided by statute. 1985

Sec. 12. [Judicial Council — Chief justice as administrative officer.]

A Judicial Council is established, which shall adopt rules for the administration of the courts of the state. The Judicial Council shall consist of the chief justice of the supreme court, as presiding officer, and such other justices, judges, and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the constitution or by statute. The chief justice of the supreme court shall be the chief administrative

IN THE FIFTH CIRCUIT COURT, IN AND FOR IRON COUNTY,

STATE OF UTAH, CEDAR CITY DEPARTMENT

S E A R C H W A R R A N T

COUNTY OF IRON, STATE OF UTAH

To any peace officer in the State of Utah:

Proof by affidavit under oath having been made this day before me by J. Lowe Barton, District Agent for the Utah Department of Adult Probation and Parole, I am satisfied that there is probable cause to believe that within the residence known as the Danny Knight residence located at Reber's Roost Trailer Park, 515 North 400 West, Space #13, Cedar City, County of Iron, State of Utah, and more particularly described as a single-wide, aluminum-sided trailer house, white in color, with trailer houses on either side, with a late model yellow Monte Carlo parked in front of said residence, there is now certain property or evidence described as:

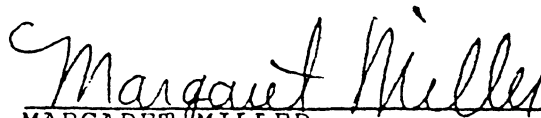
The controlled substance marijuana;

which property or evidence is unlawfully acquired or unlawfully possessed, is being possessed with the purpose to use it as a means of committing or concealing a public offense, and consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct.

YOU ARE THEREFORE COMMANDED: in the daytime or nighttime, to make a search of the above-named or described premises for the

hereinabove described property or evidence, and if you find the same or any part thereof, to bring it forthwith before me at the Fifth Circuit Court, County of Iron, State of Utah, or retain such property in your custody, subject to the Order of this Court.

Given under my hand this 11th day of January, 1989, at the hour of 3:20 P.m.


MARGARET MILLER
Circuit Court Temporary Judge

FIFTH CIRCUIT COURT
CRIMINAL CASE REFERRAL ORDER

WHEREAS, U.C.A. 78-4-15 permits referral of cases filed in the circuit court to a justice of the peace court having jurisdiction for adjudication, and,

WHEREAS, there is a need in the Fifth Circuit for magistrate functions to be exercised in the absence of the circuit judge from time to time;

IT IS THEREFORE ORDERED that the following named justices of the peace be authorized to set bail, sign search and arrest warrants, and have criminal informations sworn to before them, and to exercise other magistrate functions in all criminal cases filed in, or pending in the circuit court, at any time when the circuit judge is not available for this purpose. Upon determination of non-availability by the officer (complainant) or by the clerk, any criminal case will be treated as automatically referred for the above purposes to the below-named justices of the peace, having jurisdiction, and following the action taken, will be treated as automatically referred back to the circuit court for any further proceedings.

For criminal cases handled pursuant to this order it will not be necessary to change file numbers or transfer case files. The circuit clerk is directed to make docket entries reflecting any action taken by the justice of the peace.

Justice of the Peace

Jurisdiction

Margaret Miller
40 North 100 East
Salt City
Office: 586-4025
Home: 586-6630

Iron County

Lee Bunnell
P. O. Box 575
Washington, Utah 84780
Office: 828-1666
Home: 673-9856

Washington County

Rowland Yardley
P. O. Box 523
Beaver, Utah 84713
Office: 438-5272
Home: 438-2880

Beaver County

Dated: October 7, 1988.

Robert T. Braithwaite
Presiding Judge, Fifth Circuit

KYLE D. LATIMER - USB #4867
Chief Deputy Iron County Attorney
97 North Main, Suite #1
P.O. Box 428
Cedar City, Utah 84720
Telephone: (801) 586-6694

IN THE FIFTH CIRCUIT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH, CEDAR CITY DEPARTMENT

STATE OF UTAH,)	FINDINGS AND ORDER
)	DENYING DEFENDANTS'
Plaintiff,)	MOTION TO SUPPRESS
vs.)	
DANNY HUGH KNIGHT,)	Criminal Nos. 881000023
GAY KNIGHT,)	881000024
Defendants.)	

The above-entitled matter having come before the Court on March 3, 1989, for a hearing on Defendants' Motion to Suppress, and the above-named Defendants Danny Hugh Knight and Gay Knight having appeared in person together with their counsel of record, James L. Shumate, and the State of Utah having appeared by and through Kyle D. Latimer, Chief Deputy Iron County Attorney, and the Court, having further heard arguments of counsel, now makes and enters the following Findings:

1. The Court finds Justice of the Peace Margaret Miller executed a search warrant in the above-entitled matter on January 11, 1989, as Circuit Court Temporary Judge.

2. The Court finds the Information in the above-entitled matter had not been filed as of the time of the search warrant.

3. The Court finds Margaret Miller was and is the duly elected justice of the peace for Iron County, Cedar City Precinct.

4. The Court finds Fifth Circuit Court Judge Robert T. Braithwaite was unavailable on the day the warrant was issued.

5. The Court finds Judge Braithwaite issued an administrative order, dated October 7, 1988, authorizing the temporary transfer of criminal cases to Justice of the Peace courts in his absence, pursuant to Utah Code Ann. § 78-4-15 (1987).

6. The Court finds section 78-4-15 was repealed effective April 25, 1988.

7. The Court makes no finding regarding the statutory repeal's effect on the administrative order.

8. The Court makes no finding regarding the applicability of the good faith exception to the exclusionary rule to the facts in the above-entitled matter.

9. The Court finds, pursuant to Utah Code Ann. § 77-23-1 (1982) and Utah Code Ann. § 77-1-3(4) (1988), that a search warrant may be issued by any magistrate and that a justice of the peace is a magistrate.

10. The Court finds that until a criminal charge is filed in a specific court, a related search warrant may be issued by any magistrate regardless of any title of authority used in the search warrant.

Based upon the foregoing Findings, the Court now makes the following Order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion to Suppress should be, and hereby is, denied.

DATED this _____ day of March, 1989.

ROBERT F. OWENS
Circuit Court Judge

APPROVED AS TO FORM
AND CONTENT:

JAMES L. SHUMATE
Attorney for Defendant